No. 87-1751

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ROBERT BENNETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Petitioner was tried before a jury and acquitted of importation of cocaine and conspiracy to import cocaine, in connection with a single shipment of cocaine that was seized from an airplane flown from Colombia to the Lake City Municipal Airport in Florida. May the Government now prosecute petitioner for conspiracy to possess with intent to distribute and possession with intent to distribute cocaine based upon the same facts of the former prosecution for which petitioner was acquitted without running afoul of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The petitioner, Robert Bennett respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on February 4, 1988.

OPINION BELOW

The opinion of the Court of Appeals is reported at 836 F.2d 1314 (11th Cir. 1988), and is attached hereto as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on February 4, 1988. A timely petition for rehearing and suggestion of rehearing en banc was denied on March 9, 1988 (See, Appendix B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation of the double jeopardy clause contained in the Fifth Amendment to the United States Constitution, which provides, "...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

STATEMENT OF THE CASE

On November 14, 1984, a small airplane carrying approximately 135 kilograms of cocaine in duffle bags as its cargo landed at the Lake City Municipal Airport. This landing was observed by law enforcement

personnel, who had received prior information about the plane and its cargo. Shortly thereafter, Herbert Randall Webb, Jose Maria Campo and Juan Jose Gonzalez were arrested in a rental car with three duffle bags of cocaine as they were leaving the airport. The pilot of the plane, Gary Wayne Betzner managed to escape the immediate vicinity by stealing a minister's pick-up truck, but was arrested later that evening at a Holiday Inn. Although the petitioner, Robert Bennett, the fixed base operator of the Lake City Municipal Airport and his father, Robert Benati, were present at the municipal airport when the plane landed, they were not arrested that evening and in fact, were not charged with involvement in the importation until eight months later.

During that eight month period of time, indictments were returned against the four men arrested on November 14th. Of the four, Mr. Campo pled guilty and the remaining three men were convicted after a

jury trial. Subsequent to their convictions, Gary Betzner and Randy Webb began providing information to the federal government about their drug activities and implicated Mr. Bennett and his father, Mr. Benati in their importation scheme.

Based upon this information, the Government obtained an indictment against Mr. Bennett and his father, Mr. Benati. Count I charged that "[f]rom in or about July 1984, through on or about November 14, 1984, at Lake City, Florida..." Mr. Bennett, Mr. Benati and others [1/] conspired to import a quantity of cocaine in excess of 1 kilogram, in violation of 21

1/ Pedro Llinas Gonzales, Anita Condrey Wagner and Richard Allen Manning were also charged in all four counts of the Indictment. Mr. Gonzalez and Ms. Wagner, Columbian citizens, were never apprehended. Mr. Manning remained a fugitive until during appellant's trial. Upon his apprehension in California, Mr. Manning was returned to the Middle District of Florida, where he entered a plea of guilty to one count of the Indictment and was called as a Government witness against Mr. Bennett at trial.

U.S.C. § 963. Count II charged that "[f]rom in or about July, 1984, through on or about November 14, 1984, at Lake City, Florida, the same individuals conspired to possess with intent to distribute a quantity of cocaine in excess of 1 kilogram, in violation of 21 U.S.C. §846. Count III charged the same individuals with the importation of in excess of 1 kilogram of cocaine, "[o]n or about November 14, 1984 at Lake City," Florida, in violation of 21 U.S.C. §§952(a), 960(a)(1) and 960(b)(1)(A) and 18 U.S.C. §2. Count IV charged these individuals with the possession with intent to distribute in excess of 1 kilogram of cocaine "[o]n or about November 14, 1984, at Lake City, Florida", in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(A) and 18 U.S.C. §2. 2/ Pursuant to the provision of 18

2/ A fifth count, charging only Mr. Bennett with the obstruction of justice was voluntarily dismissed by the Government prior to trial.

U.S.C. §3142, appellant was denied pretrial release and he remained in custody during the pendency of his trial. On December 12, 1984, the joint trial of Mr. Bennett and his father commenced.

The Government's theory at trial was that Bob Bennett and others conspired to import a quantity of cocaine into the United States from Colombia, which cocaine was then to be distributed. According to the Government in its opening statement, Mr. Bennett acted as an intermediary between the pilot, Mr. Betzner, who was to transport the cocaine and the Colombian source. It theorized that, "[r]ight below these people" was Bob Bennett. It was the Government's position that Mr. Bennett had arranged for Mr. Betzner's plane to land at the Lake City Municipal Airport, where Mr. Bennett was the fixed base operator.

During opening, the Government set forth its theory of how Mr. Bennett and Mr. Betzner originally met; how they

subsequently met with Mr. Gonzalez and Ms. Wagner to discuss the importation of cocaine; how a plane was acquired from Joanas Papps, which was to be used to transport the cocaine; and how an antenna was installed at the Bennett residence so that the pilot, Mr. Betzner, could communicate with Randy Webb, his radio operator, while in flight. According to Mr. Yerkes, the Assistant United States Attorney in charge of the prosecution:

> We think the evidence will show that on a subsequent date in October they had another meeting in Miami. At that time they had further discussions about the drug deal and what Mr. Bennett's responsibilities were going to be.
>
> The evidence will show these responsibilities were that he was going to be responsible for the load. That Mr. Betzner was going to fly and obtain the cocaine and Mr. Bennett was going to have the contacts thereon with Miss Wagner who was actually the wife, I think the evidence will show, of Mr. Pedro Gonzales. That he would be the one who would be responsible for the cocaine after it arrived in Lake City.

That he would be the one to be responsible for receiving the payment from the Gonzaleses and who would thereafter pay him his monies for his participation in the importation of the cocaine and that he would provide security at this public airport in Lake City.

The Government's chief witnesses in support of its theory were Gary Betzner and Randy Webb. Both men testified that Mr. Bennett was an active member of the scheme to import the cocaine seized on November 14th, and Mr. Webb also implicated Mr. Benati in the conspiracy.

The Government also introduced over one hundred exhibits in its attempt to convince the jury that Mr. Bennett has been part of the scheme to import cocaine into this country for its subsequent distribution. There was no evidence presented, apart from the testimony concerning the alleged plans for importation, of Mr. Bennett's involvement in any distribution scheme.

It was Mr. Bennett's theory of defense that while a plane transporting cocaine had indeed landed at the airport which he operated, he had no knowledge of its cargo and was not involved in any cocaine smuggling activity. During opening statement counsel for Mr. Bennett argued, "They [the Government's witnesses] placed Mr. Bennett in a position where he was unaware of their criminal activity." Throughout the trial, counsel argued that while a conspiracy to import and distribute cocaine had in fact existed, Mr. Bennett was not a member of that conspiracy. It was also the stated position of the defense that the individuals testifying against Mr. Bennett were lying about Mr. Bennett's alleged involvement in an effort to reduce their sentences of imprisonment or protect the actual co-conspirators involved with them. With regard to Mr. Betzner, counsel asserted that he was an entirely incredible witness, whose testimony should be rejected

in its entirety. Indeed, Mr. Betzner's bizarre testimony on the stand ranged from his alleged introduction to cocaine by a federal district judge for health reasons, to faking his own suicide and becoming a fugitive, to administering cocaine enemas to cure his gout.

Upon the conclusion of its prosecution, the Government argued that the evidence established from that "beginning to end" Mr. Bennett was involved in a conspiracy to import cocaine into this country and distribute it. Counsel for the Government also argued that there were "...numerous meetings in which they discussed the importation of cocaine and that "...the individuals charged in this case, along with a number of other individuals, were involved in the importation and the possession with intent to distribute these drugs." Government counsel further stated:

> I think the evidence that we'll discuss as to Mr. Bennett goes on and on as to what his involvement was, right from the beginning to the end, from the time he first started meeting with some of the various witnesses who testified to you right to the end, through his arrest and after his arrest.

Acknowledging the focus of Mr. Bennett's defense, counsel argued, "The defense I submit will argue to you that they're lying and they'll say anything, just to convince the government and to be good for the government and to help convict anybody to try to get their sentences lowered." Government counsel also engaged in a detailed argument regarding the believability of his witnesses, particularly that of Mr. Betzner.

The offenses charged were described as one conspiracy and the jury was told that it was to decide, "...whether they [the defendants] participated in the conspiracy that we've described" (emphasis added). It was further told that Mr. Bennett abetted the importation of cocaine and assisted in

the plan to distribute it once it arrived into this country and that "Bob Bennett is involved in this one." It was urged to conclude that, "...Mr. Bennett was a part of the transportation, that he had the contacts with the people who had the source in Colombia". The jury was also urged to reject Mr. Bennett's theory that the Government was relying on fabricated testimony to try and convict him.

In response, defense counsel argued, "...Bob Bennett was in the middle of something and didn't know what was going on." Counsel argued that Mr. Betzner was transporting drugs under Mr. Bennett's nose and that the cocaine was not going to Mr. Bennett, stating, "The only people that needed Bob Bennett were people who wanted to use his airport." He also submitted that the witnesses had fabricated their story to protect themselves and other co-conspirators and argued that if their testimony was partially discredited, the

remainder should be closely examined. He stated, "They needed Bob Bennett's airport and to get his airport they needed his confidence and they need him now as a scapegoat." Counsel also argued the Government's witnesses had created a "script" whereby they falsely implicated Mr. Bennett and his father in the witnesses' criminal conspiracy.

The jury was thus called upon by the defense to decide whether the testimony of the Government's witnesses was believable and whether Mr. Bennett was a knowing member of the conspiratorial scheme. If the witnesses were credible and were to be believed, Mr. Bennett was involved in a conspiracy to import cocaine into this country, where it would be distributed. If the witnesses were disbelieved, Mr. Bennett was an innocent third party who had been deceived by the Government's witnesses so that they could gain access to the landing facilities at his airport.

Upon deliberations, the jury acquitted Mr. Benati of all four counts of the Indictment and returned a verdict of not guilty on Count I (conspiracy to import cocaine) and Count III (importation of cocaine) of the Indictment as to Mr. Bennett. The jury was, however, unable to reach a verdict as to Counts II (conspiracy to possess with intent to distribute cocaine) and IV (possession with intent to distribute cocaine). Upon application of counsel on the following day, Mr. Bennett was admitted to pretrial release pending retrial.

Prior to retrial, counsel for Mr. Bennett filed two motions on his behalf. The first motion, entitled Amended Motion to Dismiss Counts II and IV of the Indictment on the Grounds of Collateral Estoppel sought dismissal of the two counts remaining against him and argued that, in returning verdicts of not guilty as to Counts I and III, the jury necessarily

rejected the Government's contention that Mr. Bennett was a member of a conspiracy to import cocaine for its subsequent distribution. The second motion, entitled Motion to Limine to Prohibit Introduction By the Government of Certain Evidence on Collateral Estoppel Grounds sought to bar the introduction of "any and all evidence or testimony relating in any way to Counts I and III of the Indictment..."

Upon the submission of legal memoranda and argument, the district court entered its order denying appellant's motion to dismiss, but prohibiting the Government from introducing "...testimony or evidence relating to Bennett's involvement in a scheme to import cocaine into the Lake City Airport." In entering its order, the court specifically found that appellant's motions were nonfrivolous for purposes of appeal.

Mr. Bennett filed a timely Notice of Appeal. The Government likewise filed its motion, cross-appealing that portion of the

order restricting the introduction of evidence of the importation scheme.

On appeal, the Eleventh Circuit affirmed the district court opinion in all respects and remanded this cause for retrial on the two counts remaining against Mr. Bennett. Petitioner filed a timely motion for rehearing and rehearing en banc. On March 9, 1988. this motion was denied. Petitioner now seeks review in this Court.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction in this cause in order to maintain uniformity with its previous decision in Ashe v. Swenson, 397 U.S. 436 (1970). In addition, the granting of certiorari herein is necessary in order to determine whether the "totality of circumstances" analysis, adopted by numerous circuits within the context of double jeopardy claims raised by conspiracy defendants, but not employed by the Eleventh Circuit, is the appropriate standard to be utilized. The Eleventh

Circuit decision in this case conflicts with decisions of the Second, Third, Fourth, Fifth, Sixth and Eighth Circuits. For these reasons, the granting of jurisdiction is warranted herein.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN ASHE V. SWENSON, 397 U.S. 436 (1970).

In Ashe v. Swenson, 397 U.S. 436 (1970), this Court held that the constitutional protection against double jeopardy contains within its scope the doctrine of collateral estoppel. This doctrine means that when an issue of ultimate fact has been determined by a final and valid judgment, it cannot be relitigated by the same parties in a future lawsuit. Id. at 443. Collateral estoppel, applied within this context, serves to bar any subsequent prosecution where an ultimate issue has previously been

determined. Such ultimate issue may be determined by examining the evidence and instructions received by the jury in the first trial "set in a practical frame and viewed with an eye to all circumstances of the proceedings." Sealfron v. United States, 332 U.S. 575, 579 (1948). Significantly, this Court in Ashe indicated that this rule "...is not to be applied with the hypertechnical and archaic approach of 19th century pleading book, but with realism and rationality." Ashe, 397 U.S. at 443.

First examining the substantive offense of possession with intent to distribute cocaine, the facts of Ashe provide a framework by which to determine whether Mr. Bennett's acquittal is a bar to his retrial. In Ashe, three or four masked intruders broke into a poker game and robbed each of its players before fleeing in a stolen vehicle. Four individuals were arrested and charged with the armed robbery

of each of the six poker players. The defendant was tried for the offense of robbing one of the victims, but was found "not guilty due to insufficient evidence." Id. at 439. Six weeks later, the defendant was again tried for the robbery of another one of the players and was found guilty.

Concluding that "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers," this Court found that by its acquittal the jury had determined that he had not. Id. at 445. Significantly, this Court also held:

> The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again.

> After the first jury had acquitted the petitioner of robbing Knight, Missouri could certainly not have brought him to trial again upon that charge. Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbery of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery. For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers.

Id. at 445 (emphasis added).

As in Ashe, the issue before this court is not whether Mr. Bennett could have received separate sentences if he had been convicted of the offenses charged. Instead, the issue is whether once the jury had indicated its disbelief that Mr. Bennett was involved in the cocaine importation scheme, may the Government seek to relitigate those same facts by means of

a different charge against him.

By its acquittal of petitioner, the jury in this case necessarily decided that Mr. Bennett was not a member of the conspiracy to import cocaine for its subsequent distribution. As in Ashe, either Mr. Bennett was involved in the entire scheme or he was not. Once the jury determined Mr. Bennett was not involved, the Government should be forever barred from relitigating this fact. Yet relitigation of these facts is precisely what has been authorized by the Eleventh Circuit opinion. Indeed that opinion goes so far as to imply that the entire case against Mr. Bennett may be retried. 3/

3/ "Evidence at retrial may include evidence not necessarily determined by acquittal of the importation counts if it is introduced for the purpose of proving Bennett's involvement in the conspiracy to possess for distribution and the possession for distribution counts only." Bennett, 836 F.2d at 1317-1318.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS FROM OTHER CIRCUITS.

As noted in United States v. Liotard, 817 F.2d 1074, 1978 (3d Cir. 1987) most circuits which have defined a standard for the evaluation of a conspiracy defendant's double jeopardy claim have adopted a multi-prong "totality of the circumstances" analysis, rather than a "same evidence" approach. According to the Liotard court, the Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuit Courts of Appeals have adopted such analysis: See, United States v. MacDouglass, 790 F.2d 1135, 1144 (4th Cir. 1986); United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985); United States v. Thomas, 759 F.2d 659, 661-662 (8th Cir. 1985); United States v. Sinito, 723 F.2d 1250, 1256 (6th Cir. 1983), cert. denied, 469 U.S. 817, (1984); United States v. Phillips, 664 F.2d 971, 1066 (5th Cir. 1981) (Unit B), cert. denied, 457 U.S. 1136, (1982); United States v. Castro, 629

F.2d 456, 461 (7th Cir. 1980); United States v. Marable, 478 F.2d 151, 154 (5th Cir. 1978).

In Liotard, the Third Circuit also adopted this standard. Had the Eleventh Circuit adopted the "totality of circumstances" standard, at least with respect to the conspiracy to possess with intent to distribute charge, it is clear that Mr. Bennett's prosecution would be barred, because: 1) the location of the alleged conspiracies is identical; 2) the time of the alleged conspiracies is identical; 3) the personnel between the conspiracies alleged is identical; 4) the overt acts and role allegedly played by petitioner are identical. Liotard, at 1078.

The Eleventh Circuit chose not to employ a "totality of circumstances" test and instead focused upon whether certain facts were "necessarily determined" in favor of the defendant. It thus engaged in

a "hypertechnical and archaic approach" to the double jeopardy question which this Court condemned in Ashe. As a practical matter, the Eleventh Circuit's analysis is virtually impossible to apply. Other than the twelve citizens who sat in the jury box, no one can know what facts were necessarily determined in favor of the petitioner. This standard is therefore unworkable and impractical. Equally important, this standard is in clear conflict with the recent trend by other circuits toward a "totality of circumstances" analysis.

The panel decision further conflicts with United States v. Marable, 578 F.2d 151 (5th Cir. 1978) because it permits the Government to prosecute one conspiracy as if it were two. In Marable, the defendant was convicted of conspiracy to possess with intent to distribute heroin. Subsequent thereto he was tried and convicted of conspiracy to possess with intent to

distribute cocaine. On appeal, the defendant's cocaine conviction was reversed, the court first noting that the traditional "same evidence" test was inadequate to determine whether there existed one or more conspiracies. Rather, the court felt it necessary to determine whether the Government established the existence of more than one agreement. Id. at 153. Its examination therefore focused upon:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) placed where the events alleged as part of the conspiracy took place.

Id. at 1154.

As previously noted, in the present case, the time, people, acts charged, places and activity charged are identical. There is uniformity in every respect which

would warrant the application of the double jeopardy clause as interpreted in Marable. The panel decision, therefore, conflicts with Marable.

The panel decision also conflicts with United States v. Tercero, 580 F.2d 312 (8th Cir. 1978). In that case, the Eighth Circuit, utilizing an analysis similar to that employed by the Marable court, held that the double jeopardy barred the prosecution of the appellee for conspiracy to import marijuana in Minnesota where he had had previously been acquitted of conspiracy to import marijuana in Arizona. In doing so, the court held, "In our view the proper test, which the district court adopted, is whether the totality of the circumstances demonstrate that the two alleged conspiracies are in reality part of a single conspiracy." Tercero, at 315.

In a case with application to the present one, the Fifth Circuit has concluded that prior convictions for

conspiracy to import and conspiracy to possess with intent to distribute cocaine based upon one shipment of cocaine barred, on double jeopardy grounds, a subsequent prosecution for those offenses with respect to prior shipments of cocaine. United States v. Nichols, 741 F.2d 767 (5th Cir. 1984). Relying upon United States v. Kalish, 690 F.2d 1144, 1151 (5th Cir. 1982), the Nichols court concluded that if there is only one conspiracy, even if it contemplates the commission of several acts, the government cannot charge two conspiracies. This is particularly so where, as here, the jury has rejected the Government's case with respect to an accused's involvement in the conspiracy.

Other circuits have also concluded that a conspiracy may not be "arbitrarily subdivided" for purposes of prosecution. United States v. Vaughn, 715 F.2d 1373, 1375 (9th Cir. 1983); United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974).

In the present case, the Government made every effort to establish that Mr. Bennett was a member of the conspiracy to bring cocaine into the Lake City Municipal Airport. As is evidenced from the jury verdicts of acquittal herein, it failed to establish this fact and the jury necessarily rejected the Government's theory of Mr. Bennett's involvement. The Eleventh Circuit analysis employed herein conflicts with the clearly established precedent of other circuits.

CONCLUSION

The opinion of the Eleventh Circuit Court of Appeals in this case is in conflict with authority from this Court and also conflicts with numerous decisions from other circuits. Petitioner respectfully prays this Court to accept jurisdiction in this cause and to reverse the decision of the Eleventh Circuit to the extent it permits petitioner's retrial for conspiracy to possess with intent to distribute

cocaine and possession with intent to distribute cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served this 20th day of April, 1988 by first class United States mail upon the following:

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-3055
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT BENNETT,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(February 4, 1988)

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and PECK*, Senior Circuit Judge.
JOHNSON, Circuit Judge:

In connection with the seizure of numerous bags of cocaine brought into Florida from Columbia, Robert Bennett was

* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

charged with two conspiracy counts and two substantive counts:

1) conspiracy to import cocaine, 21 U.S.C. § 963;

2) conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 846;

3) importation of cocaine, 21 U.S.C. §§ 952(a), 960(a)(1) & 960 (b)(1)(A), and 18 U.S.C.A. § 2; and

4) possession with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(A), and 18 U.S.C. § 2.

Bennett was the owner and operator of the Lake City Municipal Airport where a plane with cocaine cargo landed on November 14, 1984. His defense at trial was that, although the plane landed at his airport, he was unaware that it was carrying cocaine. Bennett claimed that he was neither active in the cocaine smuggling nor a member of the conspiracy to import or to possess for distribution. The jury returned a verdict of not guilty as to

counts 1 and 3 (conspiracy to import and importation), but was unable to reach verdicts as to the distribution charges and a mistrial was declared for counts 2 and 4 (conspiracy to possess for distribution and possession).

Prior to the retrial on counts 2 and 4, the court granted Bennett's motion to prohibit the introduction of evidence relating to counts 1 and 3 on grounds of collateral estoppel. The court, however, denied Bennett's motion to dismiss counts 2 and 4 on grounds of collateral estoppel. As this case reaches us, Bennett is appealing the denial of the motion to dismiss the two counts concerning possession with the intent to distribute, and the government is cross-appealing the grant of the motion to prohibit evidence of the importation scheme. We consider each issue in turn.

I. Denial of the Motion to Dismiss Counts 2 and 4

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), extended Fifth Amendment protection against double jeopardy to collateral estoppel claims. The Supreme Court held that an issue of ultimate fact determined by a valid and final judgment could not be relitigated. Id. at 443, 90 S.Ct. at 1194. The test supplied by Ashe is "whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration." Id. at 444, 90 S.Ct. at 1194.

[1] This protection for relitigation has been interpreted in the Eleventh Circuit as 1) barring prosecution or argumentation of facts necessarily established by an earlier final judgment; or 2) completely barring prosecution if a fact necessarily determined in a former trial is an essential element of a

conviction. United States v. DeMarco, 791 F.2d 833, 836 (11th Cir. 1986). To bar prosecution, a finding of fact must be inconsistent with a finding of guilt in a second trial. United States v. Hewitt, 663 F.2d 1381, 1387 (11th Cir. 1981). If, however, the jury could have based its verdict on something other than the issue to be barred, then collateral estoppel would not apply. United States v. Mulherin, 710 F.2d 731, 740 (11th Cir. 1983), cert. denied, 464 U.S. 964, 104 S. Ct. 402, 78 L.Ed.2d 343 (1983), 465 U.S. 1034, 104 S.Ct. 1305, 79 L.Ed.2d 703 (1984). This determination requires a practical and realistic assessment of what makes the jury verdict coherent. Id.; United States v. Whitaker, 702 F.2d 901, 905 (11th Cir. 1983).

In this case, the issue in broad terms is whether innocence for the first part of the drug scheme (importation) necessarily carries over to innocence on the second

part of the drug scheme (possession for distribution). Based on the record before this Court, we must make an independent assessment of the separation between the two conspiracies as far as Bennett's involvement. United States v. Loyd, 743 F.2d 1555 (11th Cir. 1984).

[2] Bennett contends that the importation and distribution conspiracies were so linked that the issues necessarily decided by the jury's acquittal completely overlap with the issues of the courts to be retried. He presents three arguments for his collateral estoppel claim.

First, Bennett argues that the entire case against him depends only on the overall credibility of the government witnesses. Thus, Bennett asserts that the counts on which he was acquitted show that the jury determined the credibility of the government witnesses in his favor and that innocence with regard to the importation scheme necessarily implies innocence with

regard to the distribution scheme. However, by arguing that the issue of collateral estoppel turns on a wholesale rejection of the credibility of witnesses, Bennett makes an overbroad assumption. Inherent in the split verdict is the possibility and even likelihood that the jury accepted some and rejected some of the government witness testimony.

Second, Bennett emphasizes that the importation and distribution conspiracies were presented at trial as one and the same conspiracy. Testimony regarding the importation conspiracy came from the same sources as testimony regarding the distribution conspiracy. It appears that conspiratorial discussions that planned the importation were also conspiratorial discussions that planned the distribution. Bennett argues that, on a practical level, a jury decision on the importation scheme had to overlap with the distribution

scheme. By contrast, the district judge found that

[w]hile Bennett argues that the jury could not have engaged in this sort of sifting of evidence because the government relied on a non-divisible set of evidence to prove both importation and possession (i.e., the testimony of accomplice witnesses) in this court's opinion, a careful review of the trial transcript belies this assertion.

This "sifting" alternative is plausible and even likely given the split verdict.

Third, Bennett claims that the overlap is complete because he offered only one defense. He had not been involved in and part of the conspiracy and the witnesses lied to protect the actual co-conspirators. Bennett argues that if with regard to the importation counts the jury bought the only defense he presented, then the jury must have bought the defense with regard to the

distribution counts. We have already found as the trial judge did that the jury could have believed selective portions of the witness testimony. The only other basis that would give this argument merit would be a finding that the conspiracies were one and the same. The premise is not necessarily true.

On its face, the jury verdict bespeaks a distinction between the two conspiracies. The trial judge charged the jury on two conspiracies, and the very fact that the jury did not acquit Bennett on all four counts and instead disagreed on two of the counts implies that at least some members of the jury did not interpret the conspiracies as one. Because the split jury verdict would cohere on the basis that the jury bought Bennett's defense for the one conspiracy but not for the other, we conclude that the jury did not necessarily decide Bennett's involvement in the

distribution scheme. 1/

Therefore, we agree with the trial court that the doctrine of collateral estoppel will not bar retrial on counts 2 and 4.

II. Grant of the Motion to Exclude Evidence on Counts 1 and 3

[3] The district court's ruling on Bennett's motion to exclude evidence came in two parts. First, the district court chose not to bar upon retrial of counts 2 and 4 testimony from government witnesses "because this Court does not believe that

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1/ Additionally, Bennett has not met his burden of proof in this case. United States v. Giarratano, 622 F.2d 153, 156 n. 4 (5th Cir.1980), made clear that the defendant must precisely define those factual issues that were necessarily decided in the prior trial. United States v. Mock, 640 F.2d 629, 631 n. 1 (5th Cir. Unit B Mar. 1981). Bennett has not been precise about the issues that would bar retrial in this case. Instead he has argued the lack of credible witnesses, the manner in which evidence was presented, and the assertion of but one defense as proxies for the specific issues necessarily decided.

the jury necessarily found that the government's witnesses were completely untruthful." Second, the court chose to bar evidence and testimony "relating to Bennett's involvement in a scheme to import cocaine into the Lake City Airport. By acquitting Bennett of the counts charging importation, the jury necessarily found that Bennett was not involved in the importation of cocaine."

As to the first part, the testimony of government witnesses that Bennett conspired to import or imported the cocaine seems necessarily discredited given the jury's verdict of acquittal. However, because the inability of the jury to reach a verdict as to counts 2 and 4 makes it evidence that the jury did not reject the witnesses' credibility wholesale, those witnesses who testified about the importation scheme may testify as to facts about the distribution scheme. Cf. United States v. Kalish, 690 F.2d 1144 (5th Cir.1982), cert. denied, 459

U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983).

As to the second part, collateral estoppel bars "the reintroduction or relitigation of facts already established against the government." United States v. Mock, 604 F.2d 341, 343 (th Cir.1979). The relevant question is "What facts were necessarily determined in the first law suit?" Whitaker, 702 F.2d at 903 (quoting Ashe).

The clear import of the jury's failure to resolve the distribution counts is that the jury did not reject evidence on the distribution counts. Thus, facts relating to the distribution scheme were not necessarily determined in the first lawsuit. We recognize that some of the evidence on the possession for distribution counts is inextricably tied to evidence on the importation counts. However, any evidence that concerned distribution that was not rejected by the jury, even if that

evidence is also related to the importation counts, is admissible for the retrial on counts 2 and 4. The trial judge must make clear to the jury that such evidence should only be considered as relating to the distribution aspects of the case.

III. Conclusion

Acquittal on the importation counts did not necessarily decide innocence on the distribution counts. Evidence at retrial may include evidence not necessarily determined by acquittal of the importation counts if it is introduced for the purpose of proving Bennett's involvement in the conspiracy to possess for distribution and the possession for distribution counts only.

The judgment of the district court denying Bennett's motion to dismiss counts 2 and 4 is AFFIRMED. The case is REMANDED for trial on counts 2 and 4 in accordance with this opinion.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-3055

Filed
U.S. Court of Appeals
Eleventh Circuit
March 9, 1988
Miguel J. Cortez
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross Appellant,

vs.

ROBERT BENNETT,

Defendant-Appellant.
Cross-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ON PETITIONS FOR REHEARING AND AND SUGGESTIONS OF REHEARING EN BANC

(Opinion February 4, 1988, 11 Cir., 19__, ____F.2d___).

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and PECK*, Senior Circuit Judge

*Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

No. 87-1751

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT BENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether retrial of the counts on which the jury at petitioner's first trial was unable to reach a verdict is barred by collateral estoppel.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 836 F.2d 1314.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1988. A petition for rehearing was denied on March 9, 1988 (Pet. App. 14-15). The petition for a writ of certiorari was filed on April 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was acquitted on one count of conspiring to import cocaine, in violation of 21 U.S.C. 963, and on one count of importing cocaine, in violation of 21 U.S.C. 952(a). The jury was unable to

reach a verdict as to counts charging petitioner with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner then moved to dismiss those two counts, alleging that retrial on them would subject him to double jeopardy. He also moved to exclude on retrial all evidence relating to the importation counts on which he was acquitted. The district court granted petitioner's motion to exclude evidence relating to the importation counts but denied his motion to dismiss the remaining counts. The court of appeals affirmed.

1. Petitioner was the owner and operator of the Municipal Airport in Lake City, Florida. On November 14, 1984, a small airplane, carrying seven duffel bags containing a total of 135 kilograms of cocaine, landed at the airport. Two persons in the plane, together with the driver of an automobile who met them, were arrested as they drove away from the airport with four of the seven bags. The pilot was arrested in the vicinity later that evening (3 R. 126-130; 6 R. 690; 7 R. 814).

All four subsequently were convicted of importing cocaine, conspiring to import cocaine, possessing cocaine with intent to distribute it, and conspiring to possess cocaine with intent to distribute it. Two of the four then disclosed petitioner's involvement in the schemes. Thereafter, he too was charged in four counts. The two accomplices and others subsequently testified at petitioner's trial (see Pet. 4, 8). The jury acquitted petitioner on the two importation-related counts but failed to reach a verdict on the two distribution-related counts. The district court then denied petitioner's motion to dismiss the two remaining counts, but it ordered the exclusion of evidence relating to petitioner's involvement in a scheme to import cocaine.

2. Petitioner appealed the district court's denial of his motion to dismiss. He argued that the government's entire case against him depended on the credibility of its witnesses and that his acquittal on certain of the counts necessarily implied that the jury disbelieved the prosecution's witnesses. He also claimed that the importation and distribution conspiracies were presented at trial as a single transaction, meaning that his innocence as to either portion of the scheme necessarily implied his innocence as to all of it. Finally, he asserted that, because he presented a single, unified defense to all the charges, the jury's acquittal as to certain of the counts necessarily implied its acceptance of his defense in its entirety. Rejecting each of those claims, the court of appeals affirmed the district court's denial of his motion to dismiss (Pet. App. 6-10).

The court of appeals held that the jury's split verdict refuted each of petitioner's claims as to what the jury *necessarily* had determined. Responding to his assertion that the jury, by acquitting him, necessarily concluded that the government's witnesses lacked all credibility, the court of appeals found "[i]nherent in the split verdict * * * the possibility and even likelihood that the jury accepted some and rejected some of the government witness testimony" (Pet. App. 7). The court of appeals also rejected petitioner's claim that, despite the prosecution's presentation of the evidence as pointing to a single, unified transaction, the jury was unable to sift the evidence before it, accepting certain parts while rejecting others. "This 'sifting' alternative," the court of appeals concluded, "is plausible and even likely given the split verdict" (*id.* at 8). The court continued: "The trial judge charged the jury on two conspiracies, and the very fact that the jury did not acquit * * * on all four counts * * * implies that at least some members of the jury did not interpret the conspiracies

as one" (*id.* at 9). Finally, the court of appeals rejected petitioner's claim that, because he presented a single defense as to all four counts, the jury must have believed it in its entirety. "We have already found * * * that the jury could have believed selective portions of the witness testimony," the court held, and that finding applied to petitioner's case no less than to the prosecution's witnesses (*ibid.*).

ARGUMENT

Petitioner asserts (Pet. 17-28) that the decision below conflicts with this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), and with numerous decisions of other courts of appeals. Those claims are entirely lacking in merit.

1. In *Ashe* v. *Swenson, supra,* Ashe was charged with robbing Knight, one of six persons held up during a poker game. He was acquitted. The state subsequently retried Ashe, charging him the second time with robbing one of the other victims. This time, he was convicted. This Court reversed the conviction, holding that the state was collaterally estopped by the Double Jeopardy Clause from retrying the issue whether Ashe was one of the robbers. The Court observed that "the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not" (397 U.S. at 445). The Double Jeopardy Clause therefore made "a second prosecution for the robbery * * * wholly impermissible" (*ibid.*).

Here, by contrast, the first jury plainly failed to resolve the very question reserved for retrial; namely, petitioner's

involvement in a scheme to possess cocaine with intent to distribute it. Petitioner nevertheless argues (Pet. 20) that his retrial on the possession with intent to distribute charges will result in relitigating the "same facts" that have once been resolved in his favor. Likewise, he again claims (*id.* at 21) that "either [he] was involved in the entire scheme or he was not." The court of appeals, however, rightly observed that "the jury verdict bespeaks a distinction between the two [charged] conspiracies. The trial judge [instructed] the jury on two conspiracies, and the very fact that the jury did not acquit [petitioner] on all four counts * * * implies that at least some members of the jury did not interpret the conspiracies as one" (Pet. App. 9). It therefore does not follow that the jury concluded that petitioner had no involvement at all; had it so concluded, it would have acquitted petitioner on all rather than only half the counts against him.

Indeed, even if petitioner were right in contending that acquittal on the importation-related charges logically required acquittal on the distribution-related charges, it would not at all follow that the doctrine of collateral estoppel should be applied so as to transform his partial victory before the jury into a total victory. To the contrary, if there were a logical inconsistency in the jury's simultaneous acquittal on some counts and failure to acquit on others, it would be clear that the jury did not *necessarily* decide anything. Petitioner would have no right to argue that the verdicts of acquittal were "the one[s] the jury 'really meant.' " *United States* v. *Powell,* 469 U.S. 57, 68 (1984). Given the internal inconsistency in the jury's actions, "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—[would] no longer [be] useful" (*ibid.*).

2. Petitioner also criticizes the court of appeals for applying, as its governing standard in collateral estoppel cases, the requirement that the issue on which relitigation is contemplated be one that the jury necessarily determined in the first trial. He contends that "[t]his standard is * * * unworkable and impractical" and that other courts apply a different standard (Pet. 24).

Petitioner is wrong. It follows directly from the discussion in *Ashe* v. *Swenson*, 397 U.S. at 443-445, that collateral estoppel applies only to those issues necessarily resolved in the defendant's favor at the first trial. Every court of appeals applies that standard. See, *e.g.*, *United States* v. *DeVincent*, 632 F.2d 147, 154 (1st Cir.), cert. denied, 449 U.S. 986 (1980); *United States* v. *Medina*, 709 F.2d 155, 156 & n.** (2d Cir. 1983); *United States* v. *Keller*, 624 F.2d 1154, 1158 & n.4 (3d Cir. 1980); *Hess* v. *Medlock*, 820 F.2d 1368, 1373 (4th Cir. 1987); *De La Rosa* v. *Lynaugh*, 817 F.2d 259, 263 (5th Cir. 1987); *United States* v. *Johnson*, 697 F.2d 735, 740 (6th Cir. 1983); *United States* v. *Gentile*, 816 F.2d 1157, 1162 (7th Cir. 1987); *United States* v. *Barket*, 530 F.2d 181, 188 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976); *United States* v. *Sarno*, 596 F.2d 404, 408 (9th Cir. 1979); *United States* v. *Addington*, 471 F.2d 560, 567 (10th Cir. 1973); *United States* v. *Boldin*, 818 F.2d 771, 775 (11th Cir. 1987); *United States* v. *Bowman*, 609 F.2d 12, 17 (D.C. Cir. 1979). The cases on which petitioner relies for his claim that there is a conflict among the courts of appeals are not collateral estoppel cases at all but relate to other aspects of the Double Jeopardy Clause.* The claimed "conflict" does not exist.

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* Principally, those cases address the question whether two charged conspiracies are in fact but a single conspiracy, an issue as to which many courts have applied a "totality of the circumstances" test. See, *e.g.*, *United States* v. *Liotard*, 817 F.2d 1074 (3d Cir. 1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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MAY 1988

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